

September 27, 2013

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VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RE: Notice of Violations and Intent to File Suit under the Clean Water Act

To Whom It May Concern:

The Conservation Law Foundation (“CLF”)¹ hereby gives notice to the addressed persons of its intent to file suit pursuant to Section 505 of the Federal Water Pollution Control Act (hereinafter “Clean Water Act,” “CWA,” or “Act”), 33 U.S.C. § 1365(a), for violations of the Act specified below. This letter constitutes notice pursuant to 40 C.F.R., part 135 (the “Notice”) to the addressed persons of CLF’s intention to file suit in United States District Court of the District of Massachusetts seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this Notice letter.

The subject of this action is two-fold. First, Rocky Mountain Wood Company, Inc. , (hereinafter referred to as “Rocky Mountain”) is discharging stormwater directly associated with the timber products facility at 2666 Old Boston Post Road, Wilbraham, MA 01095 (the “Facility”), to the waters of the United States without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B). Second, Rocky Mountain has failed to obtain coverage under any Clean Water Act permit including the Multi-Sector General Permit² (“MSGP”) adopted by EPA for industrial sources of polluted stormwater runoff, and failed to comply with the specific requirements of any such permit, in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

BACKGROUND

The Facility is located on the bank of the Chicopee River, at the boundary between waterbody segments MA36-23 (upstream of the Facility) and MA36-24 (downstream of the Facility). The Chicopee River

¹ CLF is a not-for-profit 501(c)(3) organization dedicated to the conservation and protection of New England’s environment.

² ENVIRONMENTAL PROTECTION AGENCY, MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP) [hereinafter MSGP or “permit”], *available at* http://www.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf (last visited February 13, 2012).

segment upstream of the Facility (Waterbody ID MA36-23) is unimpaired and the Chicopee River segment downstream of the Facility (Waterbody ID MA36-24) is impaired. The Chicopee River confluences with the Connecticut River downstream of the Facility, which flows, ultimately, into Long Island Sound.

Waterbody Segment MA36-23 of the Chicopee River is categorized as a Category 2 Waterbody, indicating that it is in attainment for some uses and has not been assessed for other uses.³ Waterbody Segment MA36-24 of the Chicopee River is categorized as a Category 5 Waterbody, indicating that it is impaired or threatened for one or more uses and requiring a TMDL.⁴ Under the Massachusetts Surface Water Quality law the Chicopee River is a Class B waterbody⁵ “designated as a habitat for fish, other aquatic life, and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary contact recreation. Where designated in 314 CMR 4.06, they shall be suitable as a source of public water [...] shall be suitable for irrigation and other agricultural uses and for compatible industrial cooling and process uses[, and] shall have consistently good aesthetic value.”⁶ The Chicopee River segment downstream of the Facility does not meet these standards and the Environmental Protection Agency (“EPA”) has designated Chicopee River as impaired pursuant to Section 303(d) of the Act for failure to meet minimum water quality standards due to the presence of pathogens.^{7 8} Stormwater is a significant contributor to these impairments.

The Connecticut River (Segment ID MA34-05) is categorized as a Category 5 Waterbody, indicating that it is impaired or threatened for one or more uses and requiring a TMDL.⁹ The Environmental Protection Agency (“EPA”) has designated the Connecticut River as impaired pursuant to Section 303(d) of the Act for failure to meet minimum water quality standards for a pollutant.¹⁰ The Connecticut River is impaired for Polychlorinated Biphenyls (PCBs), turbidity and pathogens.¹¹

Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt.¹² Industrial activities, such as material handling and storage, processing, reclaiming, and wholesale distribution of timber product materials or other operations that occur at

³ Massachusetts Year 2012 Integrated List of Waters, *available at* <http://www.mass.gov/eea/docs/dep/water/resources/07v5/12list2.pdf> (last visited September 25, 2013).

⁴ Massachusetts Year 2012 Integrated List of Waters, *available at* <http://www.mass.gov/eea/docs/dep/water/resources/07v5/12list2.pdf> (last visited September 25, 2013).

⁵ http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/mawqs_figures_tables.pdf (last visited September 25, 2013).

⁶ See Massachusetts Surface Water Quality Standards, 314 MASS. CODE REGS. 4.05:3(b).

⁷ See 33 U.S.C. § 1313(d).

⁸ http://ofmpub.epa.gov/tmdl_waters10/attains_waterbody.control?p_au_id=MA36-24&p_cycle=2010&p_state=MA&p_report_type= (last visited September 25, 2013).

⁹ Massachusetts Year 2012 Integrated List of Waters, *available at* <http://www.mass.gov/eea/docs/dep/water/resources/07v5/12list2.pdf> (last visited September 25, 2013).

¹⁰ See 33 U.S.C. § 1313(d).

¹¹ http://ofmpub.epa.gov/tmdl_waters10/attains_waterbody.control?p_au_id=MA34-05&p_cycle=2010&p_state=MA&p_report_type= (last visited September 25, 2013).

¹² See 40 C.F.R. § 122.26(b)(13).

industrial facilities, may be exposed to stormwater.¹³ Stormwater from industrial facilities, contaminated with pollutants, is then conveyed into nearby waterbodies.¹⁴

Rocky Mountain is required to apply for coverage under a Clean Water Act discharge permit such as the MSGP in order to discharge lawfully. Since at least 2007, Rocky Mountain has been specifically required to apply for coverage under the MSGP by filing a Notice of Intent ("NOI") within ninety days after the initial issuance of the MSGP.¹⁵ On September 29, 2008, after expiration of the prior permit, the EPA issued a new MSGP requiring all covered facilities to file an NOI for coverage under the 2008 permit by January 5, 2009.¹⁶

Rocky Mountain has failed to obtain coverage under the MSGP or any other valid authorization, at any time. Therefore, Rocky Mountain is operating in violation of the Clean Water Act.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Rocky Mountain Wood Company, Inc., is the person, as defined by 33 U.S.C. § 1362(5), responsible for the violations alleged in this Notice. Rocky Mountain has operated the Facility since at least 2007, currently advertises as the operator of the Facility, and is registered with the Secretary of the Commonwealth as the operator of the Facility.¹⁷ Rocky Mountain and its agents and directors, including but not limited to John C. Burson have operational control over the day-to-day industrial activities at this Facility. Therefore, they are responsible for managing stormwater at the Facility in compliance with the Clean Water Act.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 2666 Old Boston Post Road, Wilbraham, MA 01095.

ACTIVITIES ALLEGED TO BE VIOLATIONS

Rocky Mountain has, and continues to, engage in "industrial activities," and its operations fall under SIC Code 2499, within the meaning of 40 C.F.R. § 122.26(b)(14)(ii).¹⁸ Because the Facility has a primary SIC Code of 2499 and stormwater discharges associated with industrial activity, Rocky Mountain is required to apply for, obtain coverage, and comply with the requirements of a National Pollutant Discharge

¹³ See 40 C.F.R. § 122.26(b)(14).

¹⁴ See 58 Fed. Reg. 61,146, 61,154 (November 19, 1993).

¹⁵ EPA's Final National Pollutant Discharge Elimination System Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP) was first issued in 1995, reissued in 2000, and again in 2008. See 60 Fed. Reg. 50,804 (Sept. 29, 1995); 65 Fed. Reg. 64,746 (Oct. 30, 2000); and 73 Fed. Reg. 56,572 (Sept. 29, 2008). See MSGP part 1.1 and 1.3.1.

¹⁶ See MSGP Table 1-2.

¹⁷ http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSummary.aspx?FEIN=043542041&SEARCH_TYPE=1 (last visited September 25, 2013).

¹⁸ See MSGP, Appendix D: Activities Covered, at D-2. Timber products facilities identified by the SIC Code prefix 24 (including but not limited to 2499-13: wood, mulch and sawdust) are subject to the requirements of the MSGP for stormwater discharges.

Elimination System (“NPDES”) permit such as the MSGP. Rocky Mountain has failed to take any of these required steps.

Rocky Mountain’s activities at the Facility include, but are not limited to: buying and selling mulch, bark, wood chips, clean mill chips, leaf compost and all types of earth products; the purchase, collection, processing and storage of bark, wood chips and mulch outdoors and the operation and storage of industrial equipment. The Facility’s piles contain, but are not limited to: large amounts of wood, mulch, sawdust and earth products.

Piles of wood, mulch, sawdust and earth products, interior access roads, vehicles and heavy equipment, and material processing and handling areas at the Facility are exposed to precipitation and snowmelt. Precipitation falls on and flows over the industrial materials and areas, picking up bark and wood debris, total suspended solids (TSS), leachates (which can contain high levels of TSS and biochemical oxygen demand (BOD)), oil, grease, metals, solvents, acids, nutrients, pathogens, dissolved solids, trash, fuel and other pollutants associated with the Facility’s operations. The polluted runoff is then conveyed by the operation of gravity via site grading, surface water channels, and subsurface hydrological connections into waters of the United States.¹⁹

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED

The Clean Water Act prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.²⁰ Rocky Mountain discharges stormwater associated with its industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), from its Facility via by the operation of gravity via site grading, surface water channels, and subsurface hydrological connections into waters of the United States. Because Rocky Mountain has not obtained coverage for these stormwater discharges under the MSGP or an individual NPDES permit, it is illegally discharging stormwater without a permit, in violation of 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).²¹ By failing to apply for and comply with the specific requirements of the MSGP, Rocky Mountain, is in violation of 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

a. Rocky Mountain is discharging stormwater to waters of the United States without a permit.

Rocky Mountain is an industrial discharger with a primary SIC Code of 2499 which means that pursuant to Section 402(p) of the Act, Rocky Mountain is obligated to apply for coverage under the MSGP or obtain other legal authorization. Because Rocky Mountain has operated and continues to operate without a permit under Section 402(b), Rocky Mountain is in violation of Section 301(a) of the Act.

¹⁹ See 40 C.F.R. § 122.26(c)(i)(E)(6). EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity.

²⁰ 33 U.S.C. § 1311(a).

²¹ See 33 U.S.C. § 1362(12); 40 C.F.R. § 122.2; MSGP, Appendix A: Definitions, Abbreviations, and Acronyms (defining the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source”).

In addition, during storm events, Rocky Mountain's, "industrial activities" at its Facility have resulted in a "discharge of pollutants" within the meaning of 33 U.S.C. § 1362(12) and "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14), from its Facility on each and every day that there has been a measurable precipitation event of above 0.1 inches. There have been many such storm events since 2007. The Facility is generating and conveying pollutants from at least the following point sources: piles of wood, mulch, sawdust and earth products, interior access roads, collected runoff from material processing and handling areas, channelized flow of runoff, the equipment left outdoors, the vehicles driving on and off the Facility, and other collections and conveyances of stormwater associated with industrial activity.²² The Chicopee River flows into the Connecticut River, which flows into Long Island Sound, all of which are "waters of the United States," as defined in 40 C.F.R. § 122.2, and therefore, "navigable waters," as defined in 33 U.S.C. § 1362(7). The Facility is discharging this industrial stormwater without the permit required under Section 402 of the Act, 33 U.S.C. § 1342.

b. Rocky Mountain is violating the Clean Water Act by failing to obtain coverage and failing to comply with the requirements of the MSGP.

Rocky Mountain is violating 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1), by failing to apply for, obtain coverage, and comply with the requirements of the MSGP.²³ The Facility has a primary SIC Code of 2499 and must obtain coverage under the MSGP for its stormwater discharges and for stormwater discharges from any co-located industrial activities.²⁴ Rocky Mountain's failure to obtain coverage and comply with the permit is in violation of the MSGP and 33 U.S.C. § 1342(p) of the Clean Water Act.²⁵

1) Rocky Mountain, Must Develop and Implement a Stormwater Pollution Prevention Plan (SWPPP).

As a prerequisite to obtaining coverage under the MSGP, Rocky Mountain must prepare a Stormwater Pollution Prevention Plan ("SWPPP").²⁶ The SWPPP must include, but is not limited to, the following: information related to a company stormwater pollution prevention team, a site description, a summary of pollutant sources, a description of control measures, and schedules and procedures pertaining to control measures and monitoring.²⁷ Rocky Mountain has failed to develop a SWPPP in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

²² These discharges constitute "point sources" as defined by 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2.

²³ MSGP part 1.1 and 1.2.

²⁴ See MSGP part 1.1; MSGP part 8.N.

²⁵ A thorough search of EPA's Electronic Stormwater Notice of Intent database reveals that Rocky Mountain has not filed an NOI for the Facility. EPA's Electronic Stormwater Notice of Intent database, <http://cfpub.epa.gov/npdes/stormwater/noi/noisearch.cfm> (last visited September 26, 2013).

²⁶ See MSGP part 5.

²⁷ See MSGP part 5.1.

2) Rocky Mountain Must Submit to EPA a Complete Notice of Intent to be Covered under the MSGP.

To be eligible to discharge under the MSGP, Rocky Mountain must submit a complete Notice of Intent (“NOI”) to the EPA.²⁸ To complete the NOI, Rocky Mountain is required to determine whether the body of water the stormwater is discharged to is an impaired water body, and whether the Facility discharges any specific pollutants listed on the NOI to that water body.²⁹ The downstream segment of the Chicopee River is classified as impaired water.³⁰ Because Rocky Mountain is a “New Discharger” under the MSGP,³¹ it must also provide data and other technical information to EPA to discharge to impaired waters,³² as well as implement and maintain any control measures or conditions to meet applicable water quality standards.³³ Additionally, as part of preparing the NOI, the covered Facility must make certain verifications such as verifying that no harm is done to a species in violation of the Endangered Species Act.³⁴ Rocky Mountain has failed to prepare and file an NOI meeting all applicable requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

3) Rocky Mountain Must Implement Control Measures and Meet Water-Quality Effluent Limitations.

To be eligible to discharge under the MSGP, Rocky Mountain must select, design, install, and implement control measures (including best management practices) to prevent polluted stormwater discharges from reaching nearby waterbodies. Rocky Mountain must address the selection and design considerations in the permit, meet the non-numeric effluent limitations in the permit, and meet limits contained in applicable permit effluent limitations guidelines.³⁵ These control practices must be in accordance with good engineering practices and manufacturer’s specifications.³⁶ If the control measures are not achieving their intended effect of minimizing pollutant discharges, the permittee must modify these control measures as expeditiously as practicable.³⁷ Rocky Mountain has failed to cover the materials and operations that may result in polluted stormwater runoff. Rocky Mountain has not implemented the required control measures in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

4) Rocky Mountain Must Conduct Routine Facility Inspections.

²⁸ See MSGP part 1.3.1.

²⁹ See MSGP part 2.2.2.

³⁰ See *supra* pp.1–2.

³¹ See MSGP, Appendix A: Definitions, Abbreviations, and Acronyms, at A-4 (defining the term “new discharger” as “a facility from which there is a discharge, that did not commence the discharge at a particular site prior to August 13, 1979, which is not a new source, and which has never received a finally effective NPDES permit for discharges at that site”); see also 40 C.F.R. § 122.2.

³² See MSGP part 1.1.4.7.

³³ See MSGP part 2.2.2.3.

³⁴ See MSGP part 1.1.4.5 and 2.3.

³⁵ See MSGP part 2.1.

³⁶ *Id.*

³⁷ *Id.*

To be eligible to discharge under the MSGP, Rocky Mountain must conduct routine inspections of all areas of the Facility where industrial materials or activities are exposed to precipitation, and must ensure that all stormwater control measures comply with the effluent limits contained in the MSGP.³⁸ Routine inspections must be conducted at least quarterly but in many instances monthly inspections are most appropriate.³⁹ These inspections must occur when the Facility is in operation.⁴⁰ The schedule of these inspections must be included in the Facility's SWPPP and be performed by qualified personnel.⁴¹ Rocky Mountain has failed to conduct the required routine inspections in accordance with the MSGP requirements in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

5) Rocky Mountain Must Comply with the Required Monitoring and Sampling Procedures.

To be eligible to discharge under the MSGP, Rocky Mountain must collect and analyze stormwater samples and document monitoring activities consistent with the procedures in the MSGP.⁴² The MSGP requires five types of analytical monitoring (one or more of which may apply) including quarterly benchmark monitoring, annual effluent limitations guidelines monitoring, State or Tribal-specific monitoring, impaired waters monitoring, and other monitoring as required by the EPA.⁴³ An operator must monitor each outfall identified in the SWPPP covered by a numeric effluent limit.⁴⁴ Required monitoring must be performed after stormwater events that result in an actual discharge on a required schedule.⁴⁵ All monitoring data collected under the MSGP must be reported to EPA. Furthermore, because the receiving waters are "impaired waters" under 33 U.S.C. § 1313(d), Rocky Mountain must monitor for all pollutants for which they are impaired.⁴⁶ Rocky Mountain has failed to conduct the required monitoring under the MSGP and has failed to submit the required monitoring reports to EPA in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

6) Rocky Mountain Must Carry out the Required Reporting and Recordkeeping.

Rocky Mountain must maintain and submit any and all required monitoring data.⁴⁷ Such monitoring data includes the following: an annual report to EPA which includes the Facility's findings from the annual comprehensive site inspection and any documentation of correction actions;⁴⁸ an Exceedance Report to the EPA if any of the follow-up monitoring shows any exceedances of a numeric effluent limit;⁴⁹ and any other required reports under the MSGP.⁵⁰ Rocky Mountain has failed to maintain the required records and

³⁸ See MSGP part 4.1.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See MSGP part 6.

⁴³ See MSGP part 6.2.

⁴⁴ See MSGP part 6.1.1.

⁴⁵ See MSGP part 6.1.3.

⁴⁶ See MSGP part 6.2.4

⁴⁷ See MSGP part 7.1

⁴⁸ See MSGP part 7.2.

⁴⁹ See MSGP part 7.3.

⁵⁰ See MSGP part 7.4.

failed to submit all required monitoring data under the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

7) Rocky Mountain Must Comply with the Requirement of MSGP Subpart A.

Rocky Mountain must also comply with the sector-specific requirements contained in Subpart A of the MSGP.⁵¹ Subpart A requires timber products facilities to implement additional technology-based effluent limits,⁵² meet additional SWPPP and inspection requirements,⁵³ and monitor stormwater discharges for compliance with the benchmark limitations applicable specifically to timber products facilities.⁵⁴ Rocky Mountain must also prevent any discharge of any chemical formulations or chemical additives sprayed on or applied to wood products⁵⁵ and abide by the effluent limitations for spray down/ intentional wetting of logs, if any.⁵⁶ Rocky Mountain has failed to comply with the requirements of Subpart A of the MSGP in violation of the MSGP and the Clean Water Act, 33 U.S.C. § 1342(p).

DATES OF VIOLATION

Each day on which Rocky Mountain operates its Facility without permit coverage or discharges stormwater without a permit from the Facility is a separate and distinct violation of Section 301(a) and 402(p)(2)(B) of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

Rocky Mountain has discharged stormwater without a permit in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), on every day since at least 2007 on which there has been a measurable precipitation event.

Every day, since at least 2007, on which Rocky Mountain has failed and continues to fail to apply for, obtain coverage, and comply with the requirements of the MSGP is a violation of Section 402(p)(3)(A) and (p)(4)(A) of the Clean Water Act, 33 U.S.C. §§ 1342(p)(3)(A) and (p)(4)(A).

These violations are ongoing and continuous, and barring a change in the stormwater management controls at the Facility and full compliance with the permitting requirements of the Clean Water Act, these violations will continue indefinitely.

RELIEF REQUESTED

Rocky Mountain is liable for the above-described violations occurring prior to the date of this letter, and for every day that these violations continue. Pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4, each separate violation of the Act subjects Rocky Mountain, to a penalty up to \$32,500 per day for each violation which occurred

⁵¹ See MSGP, Appendix D, Table D-1, Sector A.

⁵² See MSGP part 8.A.3.

⁵³ See MSGP part 8.A.4 and 8.A.5.

⁵⁴ See MSGP part 8.A.6.

⁵⁵ See MSGP part 8.A.2.

⁵⁶ See MSGP part 8.A.7.

between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for each violation that occurred after January 12, 2009.⁵⁷ CLF will seek the full penalties allowed by law.

In addition to civil penalties, CLF will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as permitted by law. CLF will seek an order from the Court requiring Rocky Mountain, to correct all identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Lastly, pursuant to Section 505(d) of the Act, 33 U.S.C. § 1365(d), CLF will seek recovery of costs and fees associated with matter.

CONCLUSION

During the 60-day notice period, CLF is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of further litigation. If you wish to pursue such discussions, please have your attorney contact Zachary Griefen within the next 20 days so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing at the conclusion of the 60 days.

Sincerely,



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⁵⁷ 40 C.F.R. § 19.2



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